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No. 87-775

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED FAMILIES OF AMERICA,

Appellant,

vs.

CHAN KENDRICK, et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC. FOR APPELLANT UNITED FAMILIES OF AMERICA

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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL RIGHT TO LIFE COMMITTEE, INC.

The National Right to Life Committee, Inc. is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to

Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting abortion on demand to only those instances in which the mother's life is in danger. Since *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), the members of the National Right to Life Committee have supported legislation to protect unborn human life within these guidelines. The Adolescent Family Life Act is the result of lobbying, in great part, by the members of the National Right to Life Committee, Inc. By means of this brief, the National Right to Life Committee, Inc. seeks to advance these interests by supporting the Adolescent Family Life Act.

BRIEF AMICUS CURIAE NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Brief, as they are amply stated in the Appellant's Brief of United Families of America.

SUMMARY OF ARGUMENT

The district court found that opposition to abortion is a "fundamental tenet" of many religions. Therefore, the court held that allowing religious organizations which support such a view to participate in a public funded program promoting adoption as an alternative to abortion violated the establishment clause of the first amendment.

However, opposition to abortion is a traditional societal value. It is not inherently religious, when viewed objectively. Beliefs of a religion which have discernible secular bases, in addition to any claim of Divine revelation, should be treated

differently from inherently religious beliefs, such as belief in one God, the incarnation of Christ, or reincarnation.

Opposition to abortion has roots in Western civilization, Roman law, English common law, and the scientific discoveries of the nineteenth century. In fact, the laws overturned in *Roe v. Wade*, protecting the unborn from the time of conception, were the result of the "physicians' crusade" of the American Medical Association. They were not primarily religiously motivated.

Despite these secular roots for opposition to abortion, a concerted effort has been mounted by abortion advocates to paint abortion as a religious issue. This has been done to exploit certain societal religious prejudices and to make abortion legislation vulnerable to establishment clause attacks.

Where establishment clause challenges have been made against abortion regulations, they have been consistently rejected by lower courts and by this court. In *Harris v. McRae*, this Court clearly held that, where certain values of society and religion coincide, such overlapping does not make legislation promoting such values violative of the establishment clause.

This Court has also upheld legislation allowing religious organizations to receive public funding to implement governmental objectives. This has been permitted specifically in the field of social welfare. Opposition to abortion stems from a traditional concern for humanity in the same way as concern for the welfare of orphans and neglected children. That the object of concern in abortion legislation is unborn children instead of born children is irrelevant. As the Court has permitted religious organiztions to participate in other social welfare programs, it follows that they should be able to participate in the Adolescent Family Life Act. Concern for the unborn is no more inherently religious than concern for the born. There is no establishment of religion in such involvement by religious organizations.

ARGUMENT

I

OPPOSITION TO ABORTION IS A TRADITIONAL SOCIETAL VALUE AND NOT INHERENTLY A RELIGIOUS VIEW, AND, THEREFORE, LEGISLATION DISCOURAGING ABORTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

This amicus curiae brief will address the sole issue of whether the United States District Court for the District of Columbia erred in finding that the Adolescent Family Life Act (hereinafter "AFLA"), 42 U.S.C. (& Supp. III) 300z *et seq.*, is unconstitutional, insofar as it allows religious organizations to promote opposition to abortion. The relevant portion of the AFLA provides for the use of religious organizations, along with other private sector organizations, in demonstration projects to "promote adoption as an alternative" to abortion. 42 U.S.C. 300z(b). The AFLA further provides that no grants shall be made to organizations that provide abortions, abortion counseling, or abortion referral (referral may be made if requested by the adolescent and her parent or guardian). 42 U.S.C. 300z-10(a).

The District Court found opposition to abortion to be "a fundamental tenet of many religions." *Kendrick v. Bowen*, 657 F. Supp. 1547, 1563 (D.D.C. 1987). The court observed that the AFLA did "not prohibit these religions from receiving AFLA grants." *Id.* Thus, the court held that the AFLA "contemplates subsidizing a fundamental religious mission of those organizations." *Id.*

The court further held that it was "unrealistic" "[t]o presume that AFLA counselors from religious organizations can put their beliefs aside when counseling an adolescent on matters that are part of religious doctrine." *Id.* The court added that, "even if it were possible," it would be an imposition on religious liberty for government to request such putting aside of religious beliefs in counseling situations. *Id.* The danger of the

"infusion" of religious beliefs into the instruction was particularly dangerous, held the court, in the one-on-one counseling contemplated by the AFLA. *Id.*

Finally, the court noted the "symbolic link" between the government and religion, which resulted from religious organizations providing public funded advice to pregnant adolescents. *Id.* at 1564. The court concluded that the AFLA, on its face, violated the establishment clause, by having "the primary effect of advancing religion." *Id.* Noting that public funds had actually been given to religious organizations for AFLA instruction and counseling, the court also held the AFLA unconstitutional, as applied, both for having the primary effect of advancing religion and for excessive entanglement between government and religion. *Id.* at 1564-68.

The premise upon which the district court built its holding is that opposition to abortion is a fundamentally religious matter. This premise is false.

A. Opposition to Abortion is a Traditional Societal Value

The district court's declaration that opposition to abortion "is a fundamental tenet of many religions" is inaccurate, except to the extent that many religions consider abortion to be morally wrong. The Judeo-Christian tradition is the dominant religious influence in Western civilization. Judaism considered abortion wrong, even where it was accidental, at least from the time of the writing of the Pentateuch. Exodus 21:22. At the time of the first century of the Christian era, opposition to abortion among both Jews and Christians was strong. Connery, "The Ancients and the Medievals on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution* 123 (D. Horan, E. Grant & P. Cunningham eds. 1987). A passage, used by both Jews and Christians, from a late first century catechism states, "Thou shalt not kill the child before birth by abortion or after birth by infanticide." J. Quasten & J. Plumpe, Didache 18, *Ancient Christian Writers* (J.A. Kleist trans. 1948). Such religious opposition to abortion continues to the present among many religious groups.

However, to class such opposition as a "fundamental religious tenant" is a misperception of the nature of religion. Unlike articles of faith, such as a belief in the virgin birth of Christ, monotheism, the deity of Christ, and the efficacy of the eucharist, a belief in the moral wrongness of harming other innocent humans is also held by all civilized societies. A clear distinction must be maintained between moral values, which a religion may hold in common with society at large, and matters of special revelation, upon which the religion is built. The latter are fundamental tenets of a faith. The former, while perhaps viewed as important and binding upon the faithful, are in a different category, because those beyond the faith may also subscribe to the same moral values on grounds independent of special revelation from the deity.

The fact that a religion would find something immoral which was also held by society at large to be immoral is not remarkable. Nor should it doom legal promotion of such common values by government in a pluralistic society bound by a Constitution requiring that "Congress shall make no law regarding an establishment of religion." U.S. Const. amend. I.

Opposition to abortion has a long tradition as a societal value apart from any religious support. Some of this tradition was traced in *Roe v. Wade*.[1] However, even though *Roe* discussed religious views on abortion at length, it did not conclude that opposition to abortion was primarily a religious value. In fact, *Roe* acknowledged the roots of American abortion laws in the "physicians' crusade" of the nineteenth century. 410 U.S. at 141. To conclude that opposition to abortion is an inherently religious view would require this Court to go beyond the holding of *Roe*.

[1] *Roe* concluded that abortion laws "are not of ancient or even of common law origin." 410 U.S. at 129. This, however, has been refuted by scholars. *See generally* S. Krason & W. Hollberg, *The Law and the History of Abortion: The Supreme Court Refuted* (1984); Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979); Noonan, "An Almost Absolute Value in History," in *The Morality of Abortion: Legal and Historical Perspectives* (J. Noonan ed. 1970).

Western civilization is a direct cultural descendent of the Graeco-Roman world. *Roe* cited Book V of Plato's *Republic* as authority for the proposition that abortion was commended by the ancients. *Roe*, 410 U.S. at 131. An examination of the passage and its context makes it doubtful that Socrates, who was being quoted, was even speaking of abortion, let alone endorsing it. *See* S. Krason, *Abortion, Politics, Morality, and the Constitution* at 124-31. Aristotle, in Book VII of *The Laws*, opposed abortion for purposes of population control, gave the right, when excercised, to the state and not to the woman, and opposed abortion from the time when the scientific understanding of the day believed that life had begun. *Id.* at 130.

Rome began the nearly continuous tradition of written laws against abortion in the Western world at the end of the second century of the Christian era. Connery, *supra*, at 128. According to the Roman jurist, Julius Paulus, one giving another an abortifacient could be sentenced to work in the mines or exiled with forfeiture of part of his property. If death occurred, capital punishment followed. 1 *Corpus Iuris Civilis* 326 (S. Scott trans. 1973). Severus and Antoninus decreed that a woman inducing an abortion on herself would be exiled. 10 *Corpus Iuris Civilis* 328. No distinction between early and late abortion was made in these laws, and the law clearly was intended to protect the unborn, as well as the woman. Connery, *supra*, at 1280. It is also significant that these laws proscribing abortion occurred when Roman law still associated human life with birth and the fetus was considered part of the mother before birth. 6 *Corpus Iuris Civilis* 43-50. It is plain that the Romans were not reluctant to outlaw abortion even though they believed that a fetus was not a human being until birth. Connery, *supra*, at 1290. Connery posits a well-known legal maxim as the origin of such legislation, namely, that "whenever some benefit to the fetus was at stake it was to be treated like a person already born." *Id.*

While Western civilization is a descendent of the Graeco-Roman culture, our legal tradition springs from the English common law. Early common law probably paralleled the late

Roman law, with a distinction between abortion for the fully "formed" fetus, thought to be at the gestational age of 40 days for males and 90 days for females, and the "unformed" fetus, before these periods. 2 *Fleta* 60-61 (H. Richardson & G. Sayles trans. 1955). To the usual penalties from Roman law were added, in both Roman and common law, a capital penalty for abortion of a "formed" fetus. Connery, *supra*, at 130.

Even later, when the capital penalty was dropped, the common law consistently viewed abortion as a serious crime. Sir Edward Coke and William Blackstone declared that abortion was not murder, unless the child was born alive and then died from the resulting injuries. However, Coke declared abortion not considered homicide to be a great "misprision" and Blackstone declared it a "very heinous misdemeanor." E. Coke, *Third Part of the Institutes of the Laws of England* ch.7; 4 W. Blackstone, *Commentaries on the Laws of England* 198 (1977). By this, Blackstone meant that it bordered on a capital crime. Connery, *supra*, at 130. Penalties could be severe, including loss of a member, life in prison, or forfeiture of property. E. Coke, *supra*, at 36, 39-40.

The teachings of Blackstone, of course, were predominant throughout the time from the framing of the Constitution and the first amendment to the time of the adoption of the fourteenth amendment. The common law protected the unborn at least from the time of quickening, the time when evidentiary problems could be resolved and the time when the science of the day believed that life began, and, probably, the common law also protected the fetus prior to quickening. Connery, *supra*, at 131-32.

In any event, the science of the nineteenth century underwent a profound transformation with the discovery of the human ovum and cell biology. The history of the origins of the nineteenth century American statutes limiting abortion, which were overturned in *Roe*, 410 U.S. 113, and *Bolton*, 410 U.S. 179, shows that their roots lie in the fields of science and medicine rather than religion.

Professor Victor Rosenblum has described the scientific discoveries prompting the medical profession to lead the way in gaining passage of abortion laws protecting the unborn from the time of conception. He observed:

> Only in the second quarter of the nineteenth century did biological research advance to the extent of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and undefensible.

The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 474 (1981)(statement of Victor Rosenblum, Professor of Law and Political Science, Northwestern Univ.).

About 1857, the American Medical Association led a "physicians' crusade" to enact legislation to protect the unborn from the time of conception. J. Mohr, *Abortion in America: the Origins and Evolution of National Policy, 1800-1900* 147-70 (1978). The resulting legislation, then, was not of primarily religious origin, but was prompted by the scientific and medical community.

Where traditional societal values are also a part of the moral value system of a religion, the fact that independent roots exist in secular society for such beliefs should remove legislation promoting these values from establishment clause evaluation.

Opposition to abortion is such a traditional societal value. It is not a "fundamental tenet of many religions," in the sense that belief in divine revelation is, and, therefore, is not a religious belief which is subject to the prohibitions of the establishment clause. Moreover, as the value is as much a traditional societal value as a religious one, the use of religious organizations to promote a governmental preference for adoption over abortion is permissible under the establishment clause.

B. Concerted Effort Has Been Made by Abortion Advocatesto Make Pro-Life Views Seem Primarily Religious in Nature to Allow Establishment Clause Attacks

Certain factions in the abortion conflict have tried to paint opposition to abortion as a purely religious matter, thereby subjecting restrictive legislation to establishment clause attack. For example, the National Abortion Rights Action League (NARAL), and other pro-abortion groups, have made a conscious strategy of "tarr[ing] all opposition with the brush of the Roman Catholic Church or its hierarchy, stirring up anti-Catholic prejudices, and pontificat[ing] about the necessity for the 'separation of church and state.'" B. Nathanson, *Aborting America* 172 (1979).

In his book, *The Abortion Papers: Inside the Abortion Mentality* (1983), Bernard Nathanson, a founder of NARAL (the acronym, NARAL, originally represented the name, National Association for Repeal of Abortion Laws), documents the appeal to anti-Catholic prejudice in the organization's literature. He cites a statement, issued by NARAL, at the National Symposium on Legislative Breakthroughs in 1972. Included in the statement was the following:

> With Mr. Nixon's bungling assistance the Catholic hierarchy has proved in the last month that it is bent on a frightening course: to turn the abortion issue into a religious war . . . . [W]hy has a fanatical minority of one religious faith suddenly determined to impose its dogma on the majority? . . . 'Heaven forbid that Albany should

> become a Dublin or Buffalo a Belfast to prove the ruthless power of any religious organization,' the Rev. Jesse Lyons . . . warned recently.
>
> Only one conclusion can be made: that the Catholic hierarchy is determined to bend the country to its will over abortion. What happens to all human rights in the next few years depends on what happens to abortion. If the Bill of Rights is to survive, we must never allow Cardinal Cooke to rule our bedrooms. We must never allow Catholic dogma to take over a legislature as it has done in New York . . . .
>
> We have learned a terrible lesson: the Catholic drive is unrelenting, and this is only the beginning. We must start next week to match the most powerful lobby in the nation with equal force and similar tactics. . . . The Catholic lobby succeeded in New York by concentrating a massive attack on a carefully chosen list of spineless legislators and terrorizing them with the votes of controlled Catholic blocs.

B. Nathanson, *The Abortion Papers* at 179-80.

Nathanson says this document "anatomizes the fundamentals of NARAL's 'Catholic strategy'." *Id.* at 180. "One is immediately struck by the fury, the pure vitriol of the text," he observes. *Id.* He adds that one could easily substitute the term "Jewish" or "black" resulting in a tirade one might hear from anti-semitic or racist groups. *Id.* The premises of the statement, he explains, include the implication "that any state legislator who voted against abortion law repeal . . . was 'spineless' in the sense that he was nuckling under to some massive conspiracy having its roots in Rome . . . ." *Id.* "That a legislator might be voting his conscience, or might be voting what he perceived to be the will of his constituency is simply ruled out," he noted. *Id.* at 179-80.

Nathanson also documents another tactic employed to paint abortion as a Catholic issue. Anyone with Roman Catholic connections, who acted in opposition to abortion rights, would be labelled as Catholic in news releases and news accounts. The

religious affiliations of other actors in the events would, of course, not be mentioned. An example of this approach may be seen in a statement issued by NARAL concerning the efforts of Robert Byrn to have himself declared the guardian of unborn children in danger of being aborted. The NARAL news release declared: "A Roman Catholic judge [Smith] has initiated a disgraceful incident in judicial history. He has followed religious dogma in deciding a case in a court of law." *Id.* at 201. Notably, none of the other key players in the event were described as to their religious affiliation, in NARAL new releases or newpaper articles, except for Mr. Byrn himself, who was described as "a forty year old Roman Catholic bachelor." *Id.* at 200.

In a section on "legends" of the abortion conflict, John Noonan, Jr., now judge of the Ninth Circuit, documents other efforts to develop and exploit anti-Catholic prejudices by Planned Parenthood and NARAL. J. Noonan, *A Private Choice* 53-64 (1979). In contrast , he points to the origin of the nineteenth century abortion statutes in the "physicians' crusade led by the American Medical Association at a time when Catholics did not play a major role in American social legislation." *Id.* at 58. Modern legislation against abortion, such as that struck down in the *Doe v. Bolton*, 410 U.S. 179, came from the American Law Institute, not from the Catholic church or other religious bodies. In fact, the ALI statute was criticized by Catholics as too permissive. J. Noonan, *supra*, at 59.

Noonan provided another argument against recognizing establishment clause attacks on abortion regulation:

> What the legend left out of its account was that the general Christian opposition to homicide could, if one so desired, be put in precisely similar terms. One could characterize as 'theological' every Christian claim that human beings should be respected, for every such claim derived from a view of human beings as created by God and destined for God, as 'ensouled' in traditional parlance. It was that creation and destiny which forbade their treatment as things.

> To say that the Christian position rested on a theory of ensoulment and to proceed therefore to disqualify it in the realm of secular law was to imply that Christians had no right to be heard on killings in general. The Christian opposition to genocide, to urban air raids, to the war in Vietnam was no more and no less theological than the Christian opposition to abortion. The legend, focusing on the esoteric term 'ensoulment,' encouraged defenders of the abortion liberty to believe that the Christian objection was founded on an idiosyncratic theology when it depended on the general principle of respecting other human beings, supplemented by the biological observation that unborn children were part of the human species.

Id. at 53-54.

Krason has pointed out an irony in the whole debate. He observes that "[m]any religious denominations and organizations aided the campaign to change the [restrictive abortion] laws, and were welcomed as [was] the Religious Coalition for Abortion Rights, the first interdenominational religious group to be organized specifically to promote abortion 'rights'." S. Krason, *supra*, at 73.

In reality, pro-life advocates represent all parts of the political and social spectrum. For example, Krason writes that, in 1971, the pro-life movement was "a mixed bag," including many non-Catholics, and one state chapter was headed by an agnostic of Jewish background. S. Krason, *supra*, at 69. Pro-life arguments are commonly made on the basis of the teachings of Hippocrates, the Declaration of Geneva from the World Medical Association, the Declaration of Rights of the Child issued by the United Nations General Assembly, B. Nathanson, *Aborting America*, at 173-74, and Aristotelian philosophy. S. Krason, *supra*, at 335-69. None of these is religious in nature.

The case now before the Court is the culmination of a sustained, coordinated strategy of abortion proponents to make opposition to abortion appear religious in nature. Such claims should be viewed by this Court with skepticism.

C. The Fact That Religious Teachings and Societal Values Often Overlap Is Irrelevant to Establishment Clause Analysis, According to the Precedents of This Court.

At the close of the last decade, abortion proponents brought a number of establishment clause challenges against abortion regulations. In 1979, an Ohio district court considered an establishment clause attack in *Akron Center for Reproductive Health, Inc. v. Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979). One of the clauses of the ordinance declared that human life existed from the moment of conception. It was argued that "the belief that human life exists from the time of the union of sperm and egg is a religious belief." *Id.* at 1189. This belief was asserted to be the true motivation behind the whole ordinance. *Id.*

The court dismissed the claim that such a belief was clearly and peculiarly a religious belief, when viewed objectively. *Id.* It noted that the first prong of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), establishment clause test was easily satisfied, as many secular purposes were served by restrictions on abortion. *Id.* As to the second prong of the test, the court held that there was no primary effect of advancing religion. The court declared that the primary effect was "to impose regulations upon the performance of a medical procedure." *Id.* at 1194. It concluded, "[w]hatever incidental effect that such section would also have on that woman's religious beliefs, however, it could not be termed a 'primary effect' of advancing or inhibiting religion." *Id.* at 1195. The court, likewise, found no excessive entanglement between government and religion, and rejected the claim that the "political divisiveness along religious lines" test applied to the abortion situation. *Id.* at 1195 n. 15.

Similar establishment clause claims were likewise rejected in *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979, *aff'd*, 636 F.2d 206 (8th Cir. 1980); *Charles v. Carey*, No. 79-C-4541, slip op., (N.D. Ill. Nov. 16, 1979); *Margaret S. v. Edwards*, 488 F.Supp. 181 (E.D. La. 1978); and *McRae v. Califano*, 491 F. Supp. 630 (E.D.N.Y. 1980). The latter opinion was affirmed in relevant part by this Court in *Harris v. McRae*, 448 U.S. 297 (1980).

In *Harris*, 448 U.S. at 319, this issue was settled unequivocally. The notion, that any legislation embracing a societal value which is also embraced by some religion is suspect under the establishment clause, was clearly rejected by this Court. The Court held that no "statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Id.* (quoting *McGowan v. Maryland*, 336 U.S. 420, 442 (1961)).

In the earlier case of *McGowan v. Maryland*, this Court stated that, "In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation." 336 U.S. at 442. The Court noted that laws against theft, fraud, murder, adultery, polygamy, and Sunday closing laws were not invalidated, simply because they coincided with the beliefs of the Judaeo-Christian religions. *Id.* at 442, 453.

Addressing the issue of abortion and its identification by some with certain religious organizations, the *McRae* court noted that opposition to abortion, as expressed in the Hyde Amendment, "is as much a reflection of 'traditionalist' values towards abortion, as it is the embodiment of the views of any particular religion." *McRae*, 448 U.S. at 319. The history of American abortion legislation bears this out.[2]

In the AFLA, Congress passed legislation with a clearly secular purpose of promoting adoption as the preferred alter-

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[2] Not even Professor Lawrence Tribe, the preeminent constitutional scholar advocating a constitutional right to abortion, finds abortion regulations violative of the establishment clause. Though he once held such a view, he has since conceded that this argument is faulty. *cf. Tribe Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973) *with* L. Tribe, *American Constitutional Law* 928-29 (1978). To declare abortion inherently a religious issue would require going beyond even Tribe's position. Tribe's advocacy of abortion rights is evidenced by his writings and by his authorship of an Amicus Curiae brief submitted to this Court in *Thornburgh v. American College of Obstetricians and Gynecologists*. Brief Amicus Curiae of Senator Bob Packwood (R-Ore.), Representative Don Edwards (D-Calif.) and certain Other Members of the Congress of the United States in Support of Appellees, *Thornburgh*, 106 S.Ct. 2169 (1986).

native to abortion, which the district court herein acknowledged. *Kendrick*, 657 F. Supp. at 1560. Such a secular purpose was a valid one for Congress to promote, as held by this Court in *McRae*, 448 U.S. at 314 (quoting *Maher v. Roe*, for the proposition that a state may make "a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds." *Maher*, 432 U.S. 464, 474 (1977)).

Under the prior holding of this Court, then, the mere fact that a religious organization's views on abortion happen to coincide with governmental policy does not create a violation of the establishment clause in legislation promulgated to further that policy. The AFLA has a clear, valid secular purpose, as conceded by the district court. Its primary effect is to encourage adoption over abortion and not to promote any inherently religious view or a particular denomination or sect.

D. Concern for the Welfare of Unborn Children Is No More Religious Than Care for Born Children or Adults, Which This Court Has Held Not to Violate the Establishment Clause in Like Circumstances

The concern of Christian and other religious pro-life advocates stems from a concern for the welfare of all humanity. This is a traditional societal value. Opposition to abortion itself is a traditional societal value. Where traditional societal values have coincided with the "mission" of a religious organization, government has in the past used religious organizations to achieve secular purposes. In both *Bradfield v. Roberts*, 175 U.S. 291, 298 (1899), and *Roemer v. Board of Public Works*, 426 U.S. 736, 746 (1976), this Court upheld the principle that religious organizations may be granted public funds for the performance of secular purposes, even though these secular purposes might also advance religious values of the organization.

If opposition to abortion is not an inherently religious value, as has been shown, then AFLA is no different from other governmental programs, upheld against establishment clause

attack, in which government has employed religious organizations to promote its policy choices. AFLA is analagous to care for orphans, upheld against establishment clause attack in *Sargent v. Bd. of Education*, 177 N.Y. 317, 69 N.E. 722 (1904), or like care for neglected adolescents, upheld in *Dunn v. Chicago Industrial School of Girls*, 280 Ill. 613, 117 N.E. 735 (1917).

However, because some religious organizations believe abortion to be wrong, the district court held that allowing them to receive federal funds to promote adoption over abortion had the primary effect of advancing religion. *Id.* As seen from the history of the abortion statutes in America, such legislation is not uniquely religious. Nor are the views of religious organizations on pregnancy and the beginning of human life especially "religious," any more than are their views on feeding the hungry and caring for the powerless. As the district court in *McRae* declared, "*Roe v. Wade* [did not] remov[e] the issue from the field of secular action." *McRae v. Califano*, 491 F. Supp. at 741.

On a practical level, it seems sensible that Congress should recruit those opposed to abortion to oppose abortion. The alternative, of hiring only those favoring permissive abortion to promote adoption as the preferred alternative to abortion, makes no sense. As a municipality may hire police officers with religious beliefs against murder and crimes of all sorts, so government should be able to enlist the aid of religious organizations that share the specific purposes that government wants to achieve. Of course, this is only allowable where the government purpose is secular in nature, as it is herein.

That Congress should choose to pursue its legitimate, secular, policy choices by a traditional means of employing religious organizations to aid it, along with other organizations, is wholly in keeping with the precedent of this Court.

CONCLUSION

The fact that a religious organization's beliefs regarding the preferability of adoption over abortion happen to coincide with the views of the state does not amount to a violation of the establishment clause, if that organization is allowed, under the AFLA, to promote that policy to adolescents. The district court erred under the prior decisions of this Court by applying establishment clause analysis, and concluding, thereby, that the AFLA had the unconstitutional primary effect of promoting religion and that, as applied, it constituted an excessive entanglement of government with religion. To affirm such a decision would require this Court to go beyond the holding of *Roe v. Wade*. Thus, the Amicus Curiae respectfully urges this honorable Court to reverse the decision below and declare the AFLA constitutional, on its face and as applied, with regard to the participation of religious organizations.

Respectfully submitted,

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